circumstances whatsoever justifying their grant. Those orders are therefore void and of no effect. I need hardly say that any of those orders if void would vitiate the order for sale since this would interrupt the continuity of the life of the prohibitory order. The position therefore is no different from a case where there has been no renewal of a prohibitory order. The orders for extension of the prohibitory order, the prohibitory order and the order for sale itself are therefore set aside with costs. In consequence, the judgment creditor's application that the date, time and venue of the auction be fixed is dismissed.

Stepping aside and taking a second hard look at the court file, and, in particular, the contemporary minutes thereon in the personal handwriting of the senior assistant registrar, I now note that there had been an active though inadvertent misstatement as to certain fundamental facts in the judgment creditor's application for the first extension of the prohibitory order which provide strong reinforcement for the conclusion at which I have arrived.

The application for the prohibitory order although heard on 5 September 1989 was in fact granted by the senior assistant registrar not on that day but on the next day. This would mean that unless extended it would have expired on 5 March 1989. Yet the judgment creditor had mistakenly stated in the same application that the prohibitory order was due to expire on 12 March 1989 and, in consequence, the senior assistant registrar relying on that averment, made an order as late as 10 March 1989 — that is to say four days *after* expiry of the prohibitory order — purporting to extend the life of the prohibitory order for a period of six months with effect from 13 March 1989. The order purporting to grant the first extension was thus made by the senior assistant registrar ultra vires the powers conferred upon her by O 47 r 6(5) since there is no power to resuscitate a dead prohibitory order. In consequence, the second and subsequent extension orders suffered from the same defect since they were all based upon the premise that the prohibitory order was due to expire on 12 March 1989 and were likewise void and of no effect.

The judgment creditor's remedy may perhaps lie in seeking a further prohibitory order provided it can satisfy the requirements of O 47 r 6(7) but that is a question which does not arise in these proceedings and upon which I express no concluded opinion.

Defendants' application allowed.

Solicitors: *Thillaimuthu & Tan Phock Kin; Yeap & Co.*

Reported by *Wong Kian Kheong*

Pendakwa Raya v Ooi Lye Seng

HIGH COURT (KUALA LUMPUR) — ULANGBICARA JENAYAH CR 51-115-1987
ZAKARIA YATIM J
30 NOVEMBER 1990

Civil Procedure — Precedent — Whether case relied on by magistrate to acquit and discharge the defendant was decided per incuriam

Statutory Interpretation — Repeal of Act — Whether repeal implies revocation of subsidiary legislation made thereunder — Interpretation Act 1967, s 65 — Interpretation and General Clauses Ordinance 1948, ss 2(1) & 11(2)

The defendant was charged under by-law 1(18) of Part VI of the Petaling Jaya Town Area (Amendment) By-Laws 1975 but was acquitted and discharged without a trial, the magistrate having relied on the decision in an earlier case. The public prosecutor appealed against the acquittal, alleging that the earlier case had been decided per incuriam. The question before the court was whether the by-laws were in force at the time the defendant allegedly committed the offence even though the Enactment pursuant to which the by-laws were passed had itself been repealed by another Act and the Interpretation and General Clauses Ordinance 1948 had been repealed by the Interpretation Act 1967.

Held, setting aside the magistrate's order and ordering a fresh trial by another magistrate:

(1) Even though the Enactment pursuant to which the by-laws had been passed had been repealed by the Local Government Act 1976, not all by-laws had been expressly repealed.

(2) The Interpretation and General Clauses Ordinance 1948 notwithstanding its repeal by the Interpretation Act 1967 continued to apply to any written law to which it applied immediately before the commencement of the 1967 Act and to subsidiary legislation made after the commencement of the Act under such a written law.

(3) Pursuant to s 11(2) of the Ordinance, therefore, the by-laws were valid at the time of the defendant's offence and therefore still remained in force for the present case and the magistrate was therefore wrong in acquitting and discharging the defendant without holding a trial.

[Bahasa Malaysia summary

Defendan telah dituduh di bawah undant-undang kecil 1 (18) Bahagian VI Kawasan Bandaraya Petaling Jaya (Pindaan) Undang-undang Kecil 1975 tetapi telah dilepaskan dan dibebaskan tanpa satu perbicaraan, dengan mejistret bergantung kepada keputusan dalam kes yang lebih awal. Pendakwa raya merayu terhadap pembebasan itu, mengatakan bahawa kes yang lebih awal itu telah diputuskan per incuriam. Soalan di hadapan mahkamah ialah sama ada undang-undang kecil masih berkuatkuasa pada masa defendan dikatakan telah melakukan kesalahan walaupun Enakmen di bawah mana undang-undang kecil telah diluluskan telah dengan sendirinya dimansuhkan oleh Akta yang lain dan Ordinan Tafsiran dan Fasal-fasal Am 1948 telah dimansuh oleh Akta Tafsiran 1967.

Diputuskan, mengenepikan perintah mejistret dan mengarah perbicaraan baru oleh mejistret lain:

(1) Walaupun Enakmen di bawah mana undang-undang kecil diluluskan telah dimansuhkan oleh Akta Kerajaan

Tempatan 1976, bukan semua undang-undang kecil telah nyata dimansuhkan.

(2) Ordinan Tafsiran dan Fasal-fasal Am 1948, walaupun dimansuhkan oleh Akta Tafsiran 1967, terus dipakai kepada sebarang undang-undang bertulis di mana ianya terpakai sebaik sahaja sebelum permulaan Akta 1967 itu dan kepada perundangan subsidiari yang dibuat selepas permulaan Akta di bawah undang-undang bertulis tersebut.

(3) Menurut s 11(2) Ordinan, undang-undang kecil adalah masih sah pada masa kesalahan defenda dan jadi masih berkuatkuasa bagi kes ini dan mejistret adalah salah dalam melepaskan dan membebaskan defendan tanpa mengadakan satu perbicaraan.]

Cases referred to

1 *Daihatsu (Malaysia) Sdn Bhd* v *Pendakwa Raya* [1987] 1 MLJ 88 (not folld)
2 *Cheam Gaik Chye* v *PP* [1967] 1 MLJ 51 (folld)

Legislation referred to

Interpretation Act 1967 s 65
Interpretation and General Clauses Ordinance 1948 ss 2(1), 11(2)
Local Government Act 1976 s 166
Petaling Jaya Town Area (Amendment) By-laws 1975 by-law 1(18) of Part VI

Mohd Hanafiah bin Zakaria for the Public Prosecutor.
Accused in person.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the public prosecutor against the decision of the magistrate, who acquitted and discharged the defendant without a trial. The defendant was charged as follows:

> Bahawa kamu pada 21 Januari 1987 lebih kurang jam 2.40 petang telah menggunakan premis No 48, Jalan SS 2/24, Petaling Jaya Selangor sebagai kedai membuat perabot rotan tanpa mempunyai lesen yang diberi oleh pihak Majlis Perbandaran Petaling Jaya untuk tahun 1987 dan dengan itu, kamu telah melanggar Undang-Undang Kecil 1(18) Bahagian VI Undang-Undang Kecil Kawasan Bandaran, Petaling Jaya (Pindaan) 1975, satu kesalahan yang boleh dihukum di bawah seksyen 119 Akta Kerajaan Tempatan 1976.

In his grounds of judgment, the learned magistrate said:

> The defendant was discharged and acquitted on the ground that this court is bound by the decision of the High Court in the case of *Daihatsu (M) Sdn Bhd* v *PP* [1981] 1 MLJ 88.

In his petition of appeal the public prosecutor states that he is dissatisfied with the order of acquittal made by the learned magistrate for the following reason, namely:

> that the decision of the High Court in *Daihatsu (Malaysia) Sdn Bhd* v *PP* [1987] 1 MLJ 88, which was relied on by the learned magistrate, was in fact decided per incuriam, that is to say, in oversight of certain relevant statutory provisions.

Since the defendant was charged under by-law 1 (18) of Part VI of the Petaling Jaya Town Area (Amendment) By-laws 1975, the question for the court to consider is whether the said by-laws were in force on 31 January 1987, that is the date the defendant was alleged to have committed the offence.

In *Daihatsu (M) Sdn Bhd* v *Pendakwa Raya*[1] the appellants were charged on 4 October 1983 for using their premises for the trade of a motor car dealer without a licence from the Petaling Jaya Municipal Council thereby contravening by-law 1 (51) of Part VI of the Petaling Jaya Town Area (Amendment) By-laws 1975. The magistrate convicted the appellants and fined them $1,000. The appellants appealed principally on the ground that the learned magistrate erred when he held that the by-laws were valid. The court held that the by-laws made by the Majlis Perbandaran Petaling Jaya pursuant to the Town Board Enactment (FMS Cap 137) ceased to be valid on the repeal of s 16(1) of the Enactment by s 166 of the Local Government Act 1976 and accordingly the appellants were wrongly charged and convicted under the said by-laws.

In my opinion, in the present case, the by-laws under which the defendant was charged were in force on 23 January 1987. Section 166 of the Local Government Act 1976 did not repeal the said by-laws. The said by-laws were made under the former Town Board Enactment (FMS Cap 137). Section 166 of the Local Government Act 1976 has, with the exception of a number of sections, repealed the said Enactment. But the Act does not expressly repeal all by-laws made under the Enactment.

What then is the position of the said by-laws after the repeal of the Town Board Enactment? Section 65 of the Interpretation Act 1967 repealed the Interpretation and General Clauses Ordinance 1948. The section states:

> (1) The Interpretation and General Clauses Ordinance 1948, is repealed in so far as it is a federal law.
> (2) Notwithstanding subsection (1), the Ordinance thereby repealed shall continue to apply to any written law to which it applied immediately before the commencement of this Act and to subsidiary legislation made after the commencement of this Act under such a written law.

The words 'written law' in s 65 are defined in s 2(1) of the Interpretation and General Clauses Ordinance 1948 to mean all Acts of Parliament, Ordinances and Enactments in force in the Federal or any part thereof and all subsidiary legislations made thereunder. Section 11(2) of the said Ordinance states as follows:

> Where a written law repeals in whole or in part any former written law and substitutes other provisions therefore, *any subsidiary legislation made under the former written law shall*, so far as it is not inconsistent with such substituted provisions, *remain in force* until revoked or replaced by subsidiary legislation made under the repealing written law, and *shall be deemed for all purposes to have been made thereunder*. (Emphasis added.)

In my view, the Petaling Jaya Town Area (Amendment) By-laws 1975 still remained in force on the date in question, and for the purpose of the present case, are deemed to have been made under the Local Government Act 1976. This view is consistent with the decision of the Penang High Court in *Cheam Gaik Chye* v *PP*.[2] In that case, the appellant had been convicted of being found in possession of a trawler net without licence, an offence under r 2(1) of the rules made under the Fisheries Ordinance (Cap 146) which had been repealed by the Fisheries Act 1963. The court held that under s 11(2) of the Interpretation and General Clauses Ordinance 1948, the Fisheries Rules 1924 made under the repealed Ordinance continued in force and were deemed to have been made under the Fisheries Act 1963 and the breach of such rules could be punished under s 13 of the Fisheries Act 1963.

I respectfully agree with the decision in *Cheam Gaik Chye*'s case.[2] The Petaling Jaya Town Area (Amendment) By-laws 1975 are deemed to have been made under the Local Government Act 1976 and a breach of by-law 1(18) of Part (VI) of the said by-laws is punishable under s 119 of the Local Government Act 1976.

The magistrate was therefore wrong in acquitting and discharging the defendant without holding a trial. The order made by the magistrate is set aside and I order that the defendant be tried by another magistrate on the same charge.

Appeal allowed.

Reported by *Yap Shao Sin*

Yap Sing Hock & Anor v Public Prosecutor

HIGH COURT (JOHORE BAHRU) — CRIMINAL APPEAL NOS 44-1 AND 44-2 OF 1989
ABU MANSOR J
22 JULY 1990

Companies and Corporations — Directors — Appointment of directors — Statutory documents relating to appointment not completed — Whether appointment valid — Companies Act 1965, ss 4 & 123

Companies and Corporations — Shares — Funds of company transferred wrongfully to another company — Director of recipient company purportedly receiving loan from recipient company out of such funds — Funds used by director to purchase shares in transferor company — Whether transaction amounts to assistance by transferor company to purchase its shares — Companies Act 1965, s 67

Criminal Law — Criminal breach of trust by agent — Person appointed as director of company — Documents relating to appointment not completed — Whether person a director and agent of company — Companies Act 1965, ss 4 & 124 — Penal Code (FMS Cap 45), s 409

Criminal Law — Mens rea — Criminal breach of trust — Entrustment — Dominion — Dishonest intention — Wrongful gain and wrongful loss — Penal Code (FMS Cap 45), ss 25, 405 & 409

Evidence — Proof — Criminal trial — Standard of proof in regard to burden on defence

The first and second appellants were directors and shareholders of a company called Yap Sing Hock Holdings Sdn Bhd ('Holdings'). Holdings entered into an agreement to buy the shares in a company called Lien Hoe Sdn Bhd ('Lien Hoe'). After a number of postponements, the completion of the purchase was fixed for 30 April 1985 to be financed by a syndicated loan of $37m provided by Perwira Habib Bank Bhd.

On 30 April 1985, Holdings was short of $6m to complete the purchase. The first and second appellants were appointed directors of Lien Hoe and the other directors of Lien Hoe then each signed a written notice of resignation from office. By another resolution, the first and second appellants were authorized to operate Lien Hoe's bank account and they also resolved that three fixed deposit receipts in the name of Lien Hoe be used as security for an overdraft facility to be applied for by the first and second appellants from a bank. The first and second appellants then applied to The Hongkong and Shanghai Banking Corp ('HSBC') for an overdraft facility using the fixed deposit receipts as security. HSBC's manager approved the overdraft after obtaining approval from the chief executive of HSBC. The first and second appellants, as directors of Holdings, opened an account in the name of Holdings at HSBC. They then signed a cheque by which the sum of $12m was transferred from Lien Hoe's account to Holdings' account. With that money, they paid the sum of $6m to meet the shortfall and to complete the purchase.

In the sessions court, the first and second appellants were each convicted of the offence of criminal breach of trust by an agent, to wit, as a director of Lien Hoe, in respect of the sum of $12m under s 409 of the Penal Code.